Denver Law Review

Volume 14 | Issue 2 Article 6

July 2021

Supreme Court Decisions

Dicta Editorial Board

Supreme Court Decisions

FIRE INSURANCE—CANCELLATION—AUTHORITY OF AGENT—ESTOPPEL—SUBSTITUTED POLICY—*Royal Exchange Assurance of London vs. Luttrell et al.*—No. 13759—*Decided March 30, 1936*—*Opinion by Mr. Justice Holland.*

Plaintiff Luttrell, desiring insurance against loss by fire in the sum of $20,200 on property situated in Craig, Colorado, requested one Leroy Tucker, a local agent, to insure the property. Tucker procured various policies aggregating this amount in various companies, one of which was the defendant, Royal Exchange Assurance of London. Policies were issued and premiums paid. On March 2, 1934, defendant insurance company notified its local agent in Denver it desired cancellation of its policy and policy was then arranged for in another company to be substituted for the policy of the defendant company which was cancelled. The insured did not get the letter from the local agent in regard to the cancellation of the policy and asking for its return until the day following the fire loss. On the following day the plaintiff returned the policy to the local agent presumably for cancellation. Later the plaintiff made proof of loss against all the companies, including the substitute company. Judgment was entered against defendant insurance company below.

1. The agent, when notified of defendant insurance company's request for cancellation of its policy, procured the issuance of a substitute policy from the same agent who issued defendant's policy. He, therefore, was clearly acting as the agent for the insured and not the insurer.

2. When an agent requests an insurance company, which he does not represent, to place insurance on certain property, he acts for the property owner in that transaction.

3. The acts of the agent in waiving the five day notice to the plaintiff and procuring the substitute policy were ratified by the plaintiff when he returned defendant's policy and retained the one substituted therefor.

4. The plaintiff was protected to the full amount of insurance requested and by his pleadings estopped from asserting the voiding of the substituted policy, validity of which depends upon the cancellation of the first.

5. Plaintiff could not, through his agent, return the original policy for cancellation, accept the substituted policy, claim benefits therefrom, and at the same time repudiate the purpose for which the new policy was issued.—*Judgment reversed.*

INSURANCE—DEATH BENEFIT—FAMILY INSURANCE—PAYMENT OF PREMIUM; RECEIPT AFTER DEATH—ESTOPPEL—*International Service Union Company vs. Mascarenas*—No. 14026—*Decided October 19, 1936*—*Opinion by Mr. Justice Hilliard. Mr. Justice Burke and Mr. Justice Butler concur.*

Action by wife on a death certificate which insures all the immediate members of a family. On the death of any member of the family, but as to one member only, the company undertakes to pay a sum determinable from a schedule set forth in the body of the certificate, the age of the deceased member being the deciding factor. The premium was due on the 9th day of each month; but although sometimes belated, with exception of the one due in October, 1935, all payments were made and received without question. On October 11, 1935, the wife sent the company, by mail, the premium in currency, which, as claimed, should have reached the company before noon the following day. About noon, on the 12th, the husband suddenly and unexpectedly, while in a distant county, departed this life. The company's receipt is dated October 14, 1935. The company still retains the premium.

HELD: 1. Where the insurance certificate specifically provides that "Any payment accepted after expiration of the grace period shall reinstate certificate," and it appears that the premium was sent to the company prior to the death of the insured, although after the grace period expired, and the company received the premium and retained it after learning of the death of the insured, the company is estopped to deny liability. "It has been held that rule applies when concededly the insured was dead when the premium was paid."

2. Insurance certificate interpreted and found to provide for the payment of death benefits on the death of one member of the family only.—*Judgment affirmed.*

BUILDING AND LOAN ASSOCIATION—PLEADING—MOTION TO STRIKE —*Silver State Building and Loan Association vs. Austin*—No. 13551—*Decided October 5, 1936*—*Opinion by Mr. Justice Bouck.*

Austin and wife sued the Silver State Building and Loan Association to recover on a written contract. Plaintiff's motion for judgment on the pleadings was granted and judgment entered.

1. The court below erred in striking that portion of the answer which alleged facts to show that instead of a relationship of debtor and creditor existed as claimed in the complaint, that the relationship of stockholder in a building and loan association was the status of the plaintiffs and governed by the statutes, by-laws of the association and notice of withdrawal filed by the plaintiffs.—*Judgment reversed with directions.*

Mr. Justice Butler and Mr. Justice Holland dissent.

USURY—BILLS AND NOTES—PLEADING—MONEY LENDER ACT OF 1913, 1917, 1919 AND 1935—*Waddell, et al. vs. Traylor*—No. 13979—*Decided October 5, 1936*—*Opinion by Mr. Justice Young.*

A judgment against defendant for unpaid balance of promissory note was entered below. Their first defense was that they had paid more than sufficient to satisfy the note if only lawful interest had been charged. Their second defense was that upon the execution of a former note for $375, of which the note in suit was a renewal, they only received $300 and that $75 thereof was for additional interest or compensation for the use of the borrowed money and therefore unlawful. Their third defense was that the lender was subject to Money Lenders Act of 1917 and he failed to comply therewith. Their fourth defense was that the interest charged was unconscionable and oppressive. The court below sustained plaintiff's demurrer to the second, third and fourth defense.

1. It has formerly been held that the Money Lenders Act of 1919 was unconstitutional. The attempted repeal by this act of the Money Lenders Act of 1913 and 1917 was ineffectual, but said acts were finally repealed in 1935, before the complaint herein was filed.

2. The 1913 act had a sufficiently broad title to include a provision concerning interest on money loaned and the act was constitutional.

3. The provision in the act that treble the interest paid, if in excess of the rate specified, may be recovered by the party paying the excess and that a violation of the act shall be a misdemeanor was a declaration of public policy that a note bearing interest in excess of the specified rate shall be unenforceable.

4. Contracts to perform illegal or criminal acts are void.

5. The note falls within the provision of Chapter 93, Session Laws 1917, but the act by its title, refers to interest at the rate of 12 per cent or lower, and the title is not broad enough to cover legislation with reference to interest in excess of 12 per cent.

6. The court below rightfully sustained the demurrer to the third defense.

7. The court rightfully sustained the demurrer to the fourth defense.

8. While the act of 1913 was repealed by Chapter 157 of Session Laws of 1935, which was before the suit was filed, still Section 6519, C. L. 1921, provided that the repealing of a statute shall not have the effect to extinguish any penalty, forfeiture or liability, either civil or criminal, which shall have been incurred under such statute unless the repealing act shall so expressly provide, and there was no such provision in the act of 1935.

9. Therefore the court erred in sustaining the demurrer to the second defense.—*Judgment reversed.*

LIQUORS—LICENSE FEES—OLD AGE PENSION FUND—RIGHTS OF COUNTY AND CITY—*The City of Sterling vs. The Board of County Commissioners of Logan County*—No. 13949—*Decided July 27, 1936—Opinion by Mr. Justice Hilliard.*

A declaratory judgment was entered below to determine the meaning of certain acts of the General Assembly of 1933 in reference to liquors and of an ordinance of the City of Sterling as they affect the conflicting claims of the County and City to beer license fees collected by the city. The trial court held that they belong to the county.

1. By Section 17, Chapter 45, Session Laws of 1933, it was provided that one licensed to sell beer in a municipality shall pay the treasurer thereof the sum of $80 annually in advance and in another act of 1933 an old age pension fund was created which provided, among other things, that license fees from the manufacture, sale, distribution or gift of beer collected by the State, counties and municipalities shall be a part of the old age pension funds. Another provision provided that 50% of the monies collected by a municipality from the same source should be turned over to the county pension fund. The City of Sterling by ordinance levied annual license fee of $80 from the sale of beer. It further provided that license fees should be paid into the general fund of the municipality.

2. The State by the act of April 5, 1933, required those engaged in selling beer in municipalities to pay $80 annually as license fees, all of which under the act of July 28, 1933, was appropriated to county old age pension funds.

3. The city should be required to account to the county for all of such $80 license fee and not 50% thereof.

4. The money claimed by the County arose from exactions imposed on beer venders by statute, and which the City, regardless of its ordinance, was bound to collect and account for as the General Assembly had directed.

5. Where the city collected nothing from beer venders in excess of statutory amount, there was no beer license fund which could be retained in its treasury and credited to the general fund for the use of the city.—*Judgment affirmed.*

THE PUBLIC UTILITIES COMMISSION, *et al. vs.* MANLEY, *et al.*—No. 13927—*Decided July 28, 1936—Opinion by Mr. Justice Young.*

Plaintiffs below are owners and operators of a coal mine near Canon City. They transport coal to Canon City for delivery to their customers and for re-sale, using a ton and one-half truck. In making deliveries they use the public highways of the state. Plaintiffs brought suit to enjoin defendants from enforcing Chapter 167, Session Laws 1935. The district court overruled a general demurrer and defendants elected to stand on their demurrer and injunction relief was granted.

1. The act does not delegate to the Utilities Commission legislative functions.

2. The act does not confer upon the commission judicial functions.

3. The act is not unjustly or unreasonably discriminating in exempting commercial carriers by motor vehicle of farm products and live stock.

4. The act is regulatory in character and not primarily for the raising of revenue and therefore not void because originating in the senate instead of the house.

5. The act which levied a tax of three mills per ton mile on persons transporting on the public highways their own property for sale is not confiscatory in the absence of evidence so showing where it appears by other acts that common carriers and private carriers for hire are taxed .05c per ton mile for use of the highways.—*Judgment reversed.*

Mr. Justice Holland dissents. Mr. Justice Campbell and Mr. Justice Hilliard not participating.

ALIENS—CONSTITUTIONAL LAW—RIGHT TO BEAR ARMS—HUNTING WILD GAME—*The People vs. Nakamura*—No. 13974—*Decided September 28, 1936—Opinion by Mr. Justice Holland.*

Under section 6882, Compiled Laws of 1921, information containing two counts was filed against Nakamura, an unnaturalized foreign-born resident in the first count with unlawful possession of three pheasants, and in the second count with unlawful possession of firearms, to-wit, "One shotgun, for the purpose of hunting wild game." A plea of guilty was entered as to the first count, and he was fined $90 and costs. His motion to quash the second count was sustained by the court on the ground that section 6882 is unconstitutional under sections 13 and 27 of article II of the Constitution. Nakamura was discharged and the people assign error.

1. It is a valid exercise of the police power for the legislature to prohibit unnaturalized foreign-born residents from hunting or killing wild game of the state, and in the exercise of such power it may distinguish between citizens of the state and aliens, and it follows that such portion of the act in question as is directed to this end is constitutional, but in so far as it denies the right of the unnaturalized foreign-born residents to keep and bear arms that may be used in defense of persons or property, it contravenes the constitutional guaranty and therefore is void.

2. The defendant's motion to quash the second count of the information was properly sustained.—Mr. Justice Burke and Mr. Justice Bouck dissent.—Mr. Justice Bouck files a dissenting opinion concurred in by Mr. Justice Burke.

INSURANCE—FRATERNAL SOCIETIES—SUICIDE CLAUSE—*Neighbors of Woodcraft vs. Whetstine, et al.*—No. 13762—*Decided September 28, 1936—Opinion by Mr. Justice Holland.*

Whetstine recovered below on a benefit certificate issued by the Neighbors of Woodcraft, a fraternal insurance company. The certificate was for death benefit of $2100 and contained a provision for payment of one-half the principal only in the event of death by suicide. It was admitted that the insured committed suicide and the society paid one-half of the certificate and this suit was for the unpaid half of the principal sum on the theory that the society was not exempt from the provisions of the Colorado insurance laws to the effect that suicide shall not be a defense against the payment of life insurance policies after the first policy year.

1. At the time the certificate was issued, both the certificate and the by-laws provided that in the event of death by suicide the company was not liable for more than one-half of the face amount of the certificate.

2. Section 2532, Compiled Laws of 1921, as amended, which provides that the suicide of a policy holder after the first policy year shall not be a defense against the payment of the life insurance policy is not applicable to a society organized as a fraternal or benevolent order.

3. The suicide clause being a part of the general insurance laws of the State, its provisions cannot be applied to the defense set up by the society in this case, because neither the suicide provision, nor any amendments thereto, designate application to fraternal benefit societies, which the legislature has expressly provided must be done.—*Judgment reversed.*

TAXATION—TRUCKS USED FOR COMMERCIAL PURPOSES—CONSTITUTIONALITY OF CHAPTER 167, SESSION LAWS 1935—*The Public Utilities Commission, et al. vs. Manley, et al.*—No. 13927—*Decided July 28, 1936—Opinion by Mr. Justice Young.*

Plaintiffs below are owners and operators of a coal mine near Canon City. They transport coal to Canon City for delivery to their customers and for re-sale, using a ton and one-half truck. In making deliveries they use the public highways of the state. Plaintiffs brought suit to enjoin defendants from enforcing Chapter 167, Session Laws 1935. The District Court overruled a general demurrer and defendants elected to stand on their demurrer and injunction relief was granted.

1. The act does not delegate to the Utilities Commission legislative functions.

2. The act does not confer upon the commission judicial functions.

3. The act is not unjustly or unreasonably discriminating in exempting commercial carriers by motor vehicle of farm products and live stock.

4. The act is regulatory in character and not primarily for the raising of revenue and therefore not void because originating in the Senate instead of the house.

5. The act which levied a tax of three mills per ton mile on persons transporting on the public highways their own property for sale is not confiscatory in the absence of evidence so showing where it appears by other acts that common carriers and private carriers for hire are taxed .05c per ton mile for use of the highways.—*Judgment reversed.*

Mr. Justice Holland dissents. Mr. Justice Campbell and Mr. Justice Hilliard not participating.

CONTRACTS—SURETIES—CONSIDERATION—INSTRUCTIONS — *Rawleigh Company v. Dickneite, Roberts, et al.*—No. 13704—*Decided October 19, 1936—Opinion by Mr. Justice Burke, Mr. Justice Butler and Mr. Justic Hilliard concur.*

Plaintiff in error sued defendants in error as sureties on its contract with B. The contract provided that plaintiff in error would sell its products to B, who agreed to pay therefor and also to pay balance due under all former contracts. The defendants in error guaranteed payments thereunder, and also agreed to assume and pay all prior indebtedness due and owing the plaintiff in error on the date of acceptance of contract and for all merchandise previously sold B, provided the credit liability shall not exceed $1400. This was the third contract of a series, each succeeding one being a renewal of the preceding. When the last contract was accepted, B's indebtedness under the former was $1388. When suit was instituted, the balance due and sued for was $1381.12. The first item purchased was on May 20, 1931, and the last April 25, 1933. In 1933 debits and credits appeared at intervals between January 10 and April 25.

HELD: 1. An instruction that the defendants in error were liable for the amounts due from B at the time the contract was executed, plus goods sold thereafter, less payments, should have been given.

2. An instruction that if the contract was entered into and based upon a valid consideration which was carried out, the verdict should be for the plaintiff in error in the sum of $1381.12, was defective in that it failed to state that surrender of prior contracts constituted such a consideration. This was a matter of law.

3. A pre-existing liability is a good consideration for a new promise. Consideration need not be in writing. It may be proved by parol or inferred. A written instrument purports consideration. Where a consideration is recited an additional one may be proved.—*Judgment reversed with directions to enter judgment for plaintiff in error.*

WORKMEN'S COMPENSATION—CONTRACT MADE OUTSIDE STATE—WORK AND INJURY OCCURRING IN COLORADO—*United States Fidelity & Guaranty Company, et al. vs. Industrial Commission, et al.*—No. 13988—*Decided October 19, 1936*—*Opinion by Mr. Justice Burke.*

Vaughn was the employer and Lipe was the employee. Lipe was injured while drilling an oil well at Craig, Colorado, and was awarded compensation for one year at $14 a week for temporary disability and 139 weeks thereafter at same rate for permanent disability.

Lipe's contract for employment was made in Texas and largely performed there. His work in Colorado extended only to drilling of one well. Vaughn took out insurance covering his Colorado operations. The insurance carrier admitted liability and paid thereunder $7.69 a week. Then Lipe filed his claim under the Texas act and advised he would accept no more payments under Colorado act. Nine months thereafter Lipe advised the Commission he had failed to establish his claim in Texas and then again proceeded under the Colorado act.

1. To justify recovery under the Colorado act a substantial portion of the work must be done in this state and with this must be combined either an accident in Colorado or a contract in Colorado.

2. Add to this the facts that employer and employee otherwise came within the Colorado act and the accident was covered by the insurance carrier, the Commission in Colorado had jurisdiction.

3. There was sufficient evidence to support holding that temporary disability ended December 6, 1934.—*Judment affirmed.*

WORKMEN'S COMPENSATION—COMMON LAW TRUST—LIABILITY—AGENCY—*Rhodes, et al. vs. Industrial Commission, et al.*—No. 13929—*Decided October 5, 1936*—*Opinion by Mr. Justice Burke.*

Henderson was killed by a rock slide while placer mining on property owned by a common law trust, which carried no insurance. The commission awarded compensation to his widow, and the District Court sustained the award.

1. Where the trust appeared by counsel in all proceeding below, it is too late to raise the question that it was not properly made a party, for the first time in the Supreme Court.

2. Agency may be established by the conduct of the principal and the alleged agent.

3. Evidence examined and held sufficient to establish that the trust was an employer of deceased within the meaning of Section 4423, Colorado Law of 1921.—*Judgment affirmed.*

Mr. Chief Justice Campbell, Mr. Justice Butler and Mr. Justice Holland dissent.

LIFE INSURANCE—ACCIDENTAL DEATH—DOUBLE INDEMNITY—*Kansas City Life Insurance Company vs. Pettit*—No. 13730—*Decided October 5, 1936—Opinion by Mr. Justice Bouck.*

Widow of Pettit brought suit to recover an additional indemnity on life insurance policy. Plaintiff recovered below.

1. The policy provided that if death of insured occurred from effects of an accident within the premium paying period and within 90 days from the happening of the accident, double indemnity would be paid.

2. Where such accident and death occurred two years after the policy had become a paid up policy, such accident and death did not occur within the premium paying period, as no premiums were either due or payable. The premium paying period had ceased, hence double indemnity was not recoverable.—*Judgment reversed.*
